Supreme Court, U.S.
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No. 97-1916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOHN E. HARPER,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY
and MISSOURI PACIFIC RAILROAD COMPANY,
Respondents.

On Petition for a Writ of Certiorari
to the Missouri Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

Respondents agree with Petitioner Harper's summary of the parties involved. Union Pacific Corporation is the parent corporation of Union Pacific Railroad Company. The non-wholly owned subsidiaries of Union Pacific Railroad Company are Alameda Belt Line, Automated Monitoring & Control, Inc., Belt Railway Company of Chicago, Brownsville and Matamoros Bridge Company, Central California Traction Company, Denver Union Terminal Railway Company, Harbor Belt Line Railroad, Houston Belt & Terminal Railway Company, Kansas City Terminal Railway Company, Longview Switching Company, MT Properties, Inc., Oakland Terminal Railway Company, Peoria & Pekin Union Railway Company, Portland Terminal Railroad Company, St. Joseph Terminal Railroad Company, St. Joseph & Grand Island Railway Company, Sunset Railway Company, Terminal Railroad Association of St. Louis, Texas City Terminal Railway Company, TTX Company, Union Pacific de Mexico, and Wichita Union Terminal Railway Company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company respectfully request this Court to deny Petitioner John E. Harper's Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Missouri.

STATUTES INVOLVED

45 U.S.C. § 151a.

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 153(i) First

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by

either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 55

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

STATEMENT OF THE CASE

This proceeding arises out of a "protective order" entered in the case of *John Harper v. Missouri Pacific R.R. Co. and Union Pacific R.R.. Co.*,[1] No. 962-07038, currently pending in the Circuit Court of the City of St. Louis, Missouri. Harper was employed by Union Pacific as a carman in North Little Rock, Arkansas. He filed this suit pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, for damages arising out of an injury to his low back alleged to have been suffered at work.

Petitioner's Statement of the Case does not accurately state the facts pertinent to his Petition[2] and it entirely omits other

[1] Missouri Pacific Railroad Company has merged into Union Pacific Railroad Company and is no longer a corporate entity. Thus, the interests of Missouri Pacific are the interests of Union Pacific, and this Brief will refer only to Union Pacific.

[2] For example, Harper states that Union Pacific "does not dispute that it has failed to comply with the rules of civil procedure regarding discovery." Pet. at 4. Union Pacific has consistently disputed this point, as evidenced most

(Footnote 2 continued on next page)

critical facts. Accordingly, Union Pacific submits its own statement of the facts relevant to this case.

The terms and conditions of Harper's employment with Union Pacific are governed by a collective bargaining agreement between the International Brotherhood of Railway Carmen and Union Pacific. The union agreement includes a rule which allows employees a leave of absence for medical or other reasons, not to exceed thirty days. The leave of absence may be renewed for additional thirty day periods. The same rule provides that the arbitrary refusal by the company of a reasonable amount of leave may be appealed by the employee as a claim for "unjust treatment" through grievance procedures established by the collective bargaining agreement.

Harper alleges that he injured his back on the job on April 17, 1996. During early May 1996, Harper stopped reporting to work, and has not actively worked since May 1996. On May 14,

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(Footnote 2 continued)

prominently by its successful petition for a writ of prohibition below. Harper also states that Union Pacific "does not dispute that it has initiated ex parte communications with employees who are represented by counsel." *Id.* Railroad management personnel, including Harper's supervisors, routinely communicate with the employees in their departments. Indeed, this is such a common incident of the employment relationship as not to excite comment in any but an FELA suit. Union Pacific's counsel has not, as Harper suggests, engaged in any "ex parte" contacts within the meaning of the ethical rules. No court has found that Union Pacific engaged in such contacts, and Union Pacific certainly has not "admitted" such contacts. Much of Petitioner's Statement of the Case consists of excerpts from depositions and other documents in other cases, taken out of context and supplemented by his slanted commentary. Pet. at 3-9. Notably, however, the trial court in this case conducted no evidentiary hearing and made no such findings other than to refer to prior decisions by another circuit judge "that the railroad defendants are not proceeding in good faith in taking the sort of actions here at issue." Pet. App. at 24a. The other orders were also entered without any evidentiary hearing.

1996, Union Pacific notified Harper that he should provide within two weeks a "doctor's note," or documentation explaining his absence from work. Harper ignored the request. On June 1, 1996, Union Pacific sent Harper a notice of a formal investigation and disciplinary hearing pursuant to the collective bargaining agreement scheduled for June 4, 1996 to determine whether he should be disciplined for failing to provide documentation to support his leave of absence, as instructed by his supervisor and as necessary under the collective bargaining agreement. The June 4 hearing was postponed.[3]

Harper filed his FELA suit on or about June 10, 1996 in the Circuit Court of the City of St. Louis. On July 2, 1996, Harper filed a motion for protective order and sanctions complaining about the directive that he document his leave of absence and the disciplinary hearing once scheduled for June 4. *See* Respondent's Appendix, R.A. at A-1. The motion sought to prohibit Union Pacific from (1) requiring him to submit any medical information to support his leave of absence from work; (2) requiring him to attend any type of physical evaluation; and (3) disciplining him for failing to supply medical information, attend an evaluation, or for any other type of insubordination. R.A. at A-3.

Petitioner did not seek any action on his motion for protective order and his leave of absence was renewed several times by Union Pacific. Seven months later, on February 3, 1997, Harper's supervisor directed him to provide a doctor's note signed within the last thirty days to substantiate his medical need

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[3] The hearing originally scheduled for June 4, 1996 was finally allowed to proceed on May 26, 1998, as a result of the decision below. Harper was found to have violated company rules. Union Pacific employs a progressive discipline policy, and because of Harper's history of disciplinary violations, this most recent disciplinary violation resulted in his dismissal from employment. As of the date of the filing of this Brief in Opposition, Petitioner has not taken steps to pursue any further remedies under the collective bargaining agreement.

to stay off work. Harper submitted a doctor's note dated November 22, 1996, which indicated that his condition was improving. On February 14, 1997, Union Pacific wrote Harper, pointing out that the note he had submitted was not current because it was more than thirty days old, and reiterating its request for current medical documentation. Harper's response was to set the long dormant motion for protective order for a hearing. He never amended or supplemented the motion; therefore, the motion as presented to the trial court did not mention the February 3 and 14, 1997 letters. At the hearing, the trial court took the motion under submission, and in the interim, prohibited Union Pacific from conducting any investigation or taking any disciplinary action authorized by the collective bargaining agreement.

On March 17, 1997, the trial court entered the protective order at issue. While much of the order criticized Harper's arguments, *see* Pet. App. 24a-25a, fn.2 & 3, the trial court, purporting to act pursuant to Mo. R. Civ. P. 56.01(c) in controlling discovery in the personal injury suit, entered an order which (1) required Union Pacific to "maintain" Harper on its "rolls as an active employee pending disposition" of his FELA case; (2) prohibited Union Pacific from taking "any action to alter or reduce [Harper's] seniority;" (3) prohibited Union Pacific, including Harper's immediate supervisors, from contacting him concerning his health or employment status, without notice to his counsel; and (4) prohibited Union Pacific from requiring Harper to appear for any physical evaluation, including any such examination authorized by the collective bargaining agreement, unless the trial court expressly ordered him to do so after a ruling on a motion for such an examination pursuant to Mo. R. Civ. P. 60.01. Pet. App. 27a. The only exception to this broad "protective order" permitted Union Pacific to take disciplinary action only if it proved, presumably to the trial court's satisfaction, that the employee engaged in "affirmative misconduct such as dishonesty, assault on a superior, or the like." Pet. App. 28a.

Union Pacific filed a petition for writ of prohibition in the Supreme Court of Missouri, arguing principally that the Railway Labor Act (RLA), 45 U.S.C. § 151,*et seq.*, preempts "minor disputes" such as this which arise out of the collective bargaining agreement and the employment relationship. On January 28, 1998, the Supreme Court of Missouri made its preliminary writ of prohibition absolute. Pet. App. 1a-16a; *State ex rel. Union Pacific R.R. Co. v. Dierker*, 961 S.W.2d 816 (Mo. banc 1998). The court below held that the trial court lacked jurisdiction to enter the protective order because the issue of Union Pacific's right to require a physical examination pursuant to the collective bargaining agreement and to discipline Harper for his refusal to submit to such an examination was a "minor dispute" requiring the interpretation and application of the collective bargaining agreement, and thus was preempted by the Railway Labor Act.

REASONS FOR DENYING THE WRIT

Petitioner does not assert that the decision of the Supreme Court of Missouri conflicts with the decision of another state court of last resort or that it conflicts with the decision of any United States Court of Appeals. The sole basis for the Petition is the alleged conflict between the decision below and this Court's decisions in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) and *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). However, Petitioner arrives at this so-called conflict only by misstating the holding of the Missouri Supreme Court. In fact, the decision below is entirely consistent with the prior decisions of this Court, including *Hawaiian Airlines* and *Buell*, in its application of federal law. The Court should deny the petition for a writ of certiorari.

I.

Petitioner first poses the issue of whether the Railway Labor Act preempts a state trial court from controlling discovery and "abusive tactics" supposedly used by Union Pacific in defending a claim brought by its employee pursuant to the FELA for personal injury damages. Petitioner argues that the RLA does not preempt the substantive protections of the FELA, citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) and *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). This proposition, while true enough in the abstract, has no application to this case because the FELA does not provide "substantive protections" which provide the kind of guarantees the protective order purported to give here. Rather, the protections for Petitioner's employment rights are found in the collective bargaining agreement and those rights can only be enforced through the grievance and arbitration procedures authorized by the Railway Labor Act.

The RLA preempts "minor disputes," or issues which involve interpretation or application of a collective bargaining agree-

ment. *See* 45 U.S.C. § 153(i) First. Minor disputes include controversies over how to give effect to collective bargaining agreement rights, or the meaning of the collective bargaining agreement in a particular situation. *Hawaiian Airlines*, 512 U.S. at 253. Courts look beyond the four corners of a collective bargaining agreement to determine whether a particular dispute is a minor dispute, because a "collective bargaining agreement is more than the sum of its parts. It comprises express provisions, industry standards, and 'norms that the parties have created but have omitted from the collective bargaining agreement's express language.'" *Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 836 (10th Cir. 1996), *quoting Hawaiian Airlines*, 512 U.S. at 264. A litigant cannot avoid RLA preemption by merely recasting his claim as involving a state or federal right, or by otherwise attempting to artfully plead around preemption. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)(LMRA preempted a state tort claim for bad faith handling of an insurance claim); *Monroe v. Missouri Pacific R.R. Co.*, 115 F.3d 514 (7th Cir. 1997)(RLA preempted claims that required interpretation of implied collective bargaining agreement terms), *cert. denied* 118 S.Ct. 413 (1997); *Kollar v. United Transp. Union*, 83 F.3d 124 (5th Cir. 1996)(RLA preempted the plaintiffs' fraud claim because it could not be understood without reference to the collective bargaining agreement).

Hawaiian Airlines held that the RLA did not preempt an employee's claim based upon a right independent of the collective bargaining agreement. 512 U.S. at 260-263. Petitioner assumes that the FELA provides "substantive protection" against a railroad taking any adverse action against an employee under the terms of a collective bargaining agreement while an FELA suit is pending, that the FELA prohibits an employee's supervisors from communicating with him without his attorney's consent while a suit is pending, and that the FELA prohibits a railroad from exercising its rights under the collective bargaining agreement to require an employee to submit to a physical

examination to determine whether he is fit to return to duty. These assumptions are incorrect.

The FELA is not a federal labor law statute, but a statute which gives a railroad employee the right to sue for money damages if he is injured while at work. 45 U.S.C. § 51 *et seq.* Nothing in the FELA provides the "substantive protections" Petitioner claims here. The Supreme Court of Missouri also rejected Petitioner's claim that the Missouri Rules of Civil Procedure provided an "independent right" to be free from adverse employment actions while an FELA lawsuit was pending. Pet. App. 11a; 961 S.W.2d at 822-23.

The "substantive protections" which Petitioner has against adverse personnel actions, if any, are found in the collective bargaining agreement. As the Supreme Court of Missouri held, the issue of whether such protections exist and whether they were violated is, under the Railway Labor Act, a "minor dispute" because to answer such questions the court must interpret or apply the collective bargaining agreement. Pet. App. 12a-13a.; 961 S.W.2d at 821. Thus, the court below properly found that the trial court lacked jurisdiction to resolve these employment disputes. Pet. App. 15a-16a; 961 S.W.2d at 824.

Indeed, the premise underlying Petitioner's first question presented is faulty because the Missouri Supreme Court did not hold that the RLA preempts the trial court's ability to control discovery. Rather, it found that "the Rules of Civil Procedure control discovery in an FELA suit." Pet. App. at 11a; 961 S.W.2d at 822. The court also did not hold that the RLA preempts a trial court from any action regarding so-called "abusive tactics." The Missouri Supreme Court recognized that the trial court has certain powers to control "abusive tactics," specifically stating that "in the FELA case itself, the trial court remains authorized to employ its conventional trial court powers to control the parties and the litigation in the underlying FELA action." Pet. App. at 16a; 961 S.W.2d at 824.

The court below recognized that *Buell* held that the RLA did not preempt an FELA injury claim. Pet. App. at 9a; 961 S.W.2d at 821. Union Pacific has never asserted that the RLA preempts Petitioner's FELA personal injury claim, and the Missouri Supreme did not so hold. Petitioner's naked assertion that the Missouri Supreme Court's decision conflicts with *Buell* is untenable because nothing in its ruling prevented Petitioner from going forward with his FELA suit.

II.

Petitioner's second question presented poses the issue of whether a state trial court judge "has the power to enforce 45 U.S.C. § 55 to prevent an FELA Defendant from using the provisions of the collective bargaining agreement as part of a concerted plan to exempt itself from liability." Pet. at i. The Supreme Court of Missouri did not hold that the Railway Labor Act preempted § 55. It simply noted that the trial court did not find any violation of § 55.[4] The court below pointed out that the trial court "expressly rejected" the argument that allowing the railroad to discharge an employee under the terms of the collective bargaining agreement necessarily limited the amount of damages the employee could seek in an FELA lawsuit. Pet. App. at 25a & n.3; 14a-15a; 961 S.W.2d at 823.

The trial court disagreed with the notion, implicit in Petitioner's argument, that a discharge of the employee necessarily termi-

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[4] Petitioner's motion for a protective order and for sanctions did not even mention § 55, much less claim that he was entitled to relief because of that provision of the FELA. See Resp. App. at A-1 - A-3. For that reason, the trial court's order does not mention § 55 either. Pet. App. at 21a-28a. Petitioner did not comply with Rule 14(g)(i) of this Court in specifying the stage of proceedings at which the § 55 issue was first raised in both the trial and appellate court, so as to show that this issue was timely raised. As the text notes, Petitioner did not raise the § 55 issue until the proceeding in the Supreme Court of Missouri. This alone is sufficient reason to decline to review this question presented.

nates claims of future wage loss or that such action based upon his physical disability could be used to limit the railroad's liability, if any, under the FELA to the injured employee. Pet. App. 25a-26a & n.3. The Missouri Supreme Court concurred. Pet. App. 15a. Thus, Petitioner has the effect of the decision below on this point exactly backwards: Section 55 cannot be violated because neither the trial court nor the appellate court ruled that the actions taken or threatened to be taken in his case *ipso facto* "exempted" the railroad's liability to him. Accordingly, any issues regarding § 55 are not proper subjects for this Court's review. Thus, the only question presented for review is a state law question – whether Missouri law afforded him an independent right to the relief he requested.

III.

This Court "does not sit for the benefit of particular litigants," *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 40, 74 (1955), and limits its review to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Id.* at 79. Petitioner states, without further elaboration, that the Missouri Supreme Court's decision will have a "long-reaching impact important for all railroad workers in the United States." Pet. at 16. He does not explain how the decision below will affect "all" railroad workers, as opposed to the relative handful of workers who obtained "protective orders" in the Circuit Court of the City of St. Louis, supposedly grounded upon *state* court discovery rules, that prevent any adverse employment action against them while their FELA cases are pending.

As for Petitioner himself, he has a well-established remedy for challenging disciplinary action taken against him pursuant to the grievance and appeal procedures of the RLA. Petitioner has not even explained how the Missouri Supreme Court's opinion will affect his FELA personal injury action underlying the appellate

proceedings, especially in light of the Missouri Supreme Court finding that any disciplinary action against Harper would not deny him the right to maintain his FELA suit. Pet. App. at 16a; 961 S.W.2d at 824. His FELA suit is still pending and would not be affected by any decision of this Court. Moreover, and as the Missouri Supreme Court recognized, the RLA grievance and appeal procedures provide an effective (and exclusive) remedy for Harper to challenge the same conduct involved in the protective order at issue, so the Missouri Supreme Court's decision does not leave him without a remedy.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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